2000

State of Utah v. Brian William Drake : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 20000298-CA
v.	:	
BRIAN WILLIAM DRAKE,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

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APPEAL FROM CONVICTIONS FOR FORGERY, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-501 (1999), AND THEFT BY DECEPTION, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-405 (1999), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE LESLIE A. LEWIS, PRESIDING.

KENNETH A. BRONSTON (4470)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Attorney General
Heber M. Wells Building
160 East 300 South, 6th Fl.
Salt Lake City, Utah 84114
Telephone: (801) 366-0180

STEPHANIE AMES
GUSTIN, CHRISTIAN, SKORDAS & CASTON, L.L.C.
Boston Building, Suite 810
9 Exchange Place
Salt Lake City, Utah 84111

Attorney for Appellant

KENNETH R. UPDEGROVE
Deputy Salt Lake County District Attorney
231 East 400 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellee

ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

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Deputy Salt Lake County District Attorney
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 20000298-CA
v.	:	
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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF PROCEEDING

This is an appeal from convictions for forgery, a third degree felony, in violation of Utah Code Ann. § 76-6-501 (1999), and theft by deception, a third degree felony, in violation of Utah Code Ann. § 76-6-405 (1999), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leslie A. Lewis, presiding. This Court has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996).

STATEMENT OF THE ISSUES ON APPEAL AND STANDARDS OF APPELLATE REVIEW

1. Should the Court consider a claim of error where defendant's trial counsel affirmatively led the trial court to believe the challenged instructions were satisfactory?

"'[A] party cannot take advantage of an error committed at trial when that party led the trial court into committing the error.'" *State v. Chaney*, 1999 UT App. 309, ¶54, 989 P.2d 1091.

If this Court considers the merits of defendant's claim, where the jury instructions

as a whole instructed that the State must prove the essential allegations of theft beyond a reasonable doubt, did the trial court commit plain error by not *sua sponte* referring to the State's burden again in the accomplice liability instruction?

In the absence of any objection to the trial court's instructions, error may be assigned only in order to avoid manifest injustice. *State v. Arguelles*, 921 P.2d 439, 445 (Utah 1996); *State v. Ellifritz*, 835 P.2d 170, 178 (Utah App. 1992). In reviewing a claim of manifest injustice, the appellate court uses the "same standard"as when determining the presence of plain error. *Arguelles*, 921 P.2d at 445. Thus, to constitute manifest injustice, "it should have been obvious to the trial court that it was committing error." *Id.*

2. Is the jury verdict for forgery and theft by deception supportable?

An appellate court will not reverse on grounds of insufficient evidence "[w]here there is any evidence, including reasonable inferences that can be drawn from it, from which findings of all elements of the crime can be made beyond a reasonable doubt[.]" *State v. Goddard*, 871 P.2d 540, 543 (Utah 1994). *See State v. Colwell*, 2000 UT 8 ¶ 40-42, 994 P.2d 177 (same).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following determinative constitutional provisions, statutes and rules are attached at Addendum A:

Utah Code Ann. § 76-2-202 (1999);
Utah Code Ann. § 76-6-405 (1999);
Utah Code Ann. § 76-6-501 (1999);
Utah R. Crim. P. 19.

STATEMENT OF THE CASE

Defendant, Brian William Drake, was charged with forgery (Count I) and theft by deception (Count II) (R. 6-7). A jury convicted defendant as charged (R. 122-23). The trial court sentenced defendant to statutory zero-to-five-year terms to be served consecutively in the Utah State Prison, but suspended the prison terms and placed defendant on probation (R. 132-33). Defendant timely appealed (R. 135).

STATEMENT OF THE FACTS[1]

Catherine Tousley testified that on April 28, 1998, defendant, who was a friend of hers, asked her to run a check, drawn on Providian National Bank in Tilton, New Hampshire ("Providian"), through her checking account at America First Credit Union ("America First") (R. 150:64-67, 69; State's Ex. 1). The check was made out for $3,000 to "Patricia Westlake," at "149 South Seventh East" in Salt Lake City, where defendant lived at the time of the offenses (R. 150:69-70).[2] Defendant told Ms. Tousley that he did not have an account in Utah and that Ms. Westlake owed him money (R. 150:68-70). Ms. Tousley testified that she did not know Ms. Westlake, nor had Ms. Tousley ever lived at 149 South 700 East or ever gotten into a mailbox or picked up any mail at that address (R. 150:68, 70).

Defendant instructed Ms. Tousley that in exchange for her running the check through

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[1] The facts are recited in a light most favorable to the jury's verdict. *State v. Wright*, 893 P.2d 1113, 1115 (Utah App. 1995).

[2] The parties stipulated that defendant lived at that 149 South 700 East from April 28, 1998 though May 1, 1998 (R. 150:112-13).

her account and delivering $2,500 of the $3,000 to him, she would get $500 (R. 150:70). When defendant gave her the check it was already endorsed, "Payed [sic] to the order of" and signed, "Partricia [sic] R. Westlake" (R. 150:70-71; State's Ex. 1). Although she thought "at the back of her head" that there was something wrong about the transaction, she endorsed the check, "Cathi Tousley," and deposited it into the ATM at an America First branch (R. 150:70-71, 79).

The following day, April 29, she withdrew $2,500 from a different America First branch and gave it to defendant (R. 72). Later that day, defendant gave her another $3,000 check made to and signed by "Patricia Westlake," and instructed Ms. Tousley to do the same thing with it as she had with the first check (R. 150:72-73; State's Ex. 2).[3] Defendant again said that Ms. Westlake owed him money (R. 150:73-74). Following defendant's instructions, Ms. Tousley endorsed the back of the check with her name and deposited it into yet a third America First branch, in West Valley City (R. 73-74).[4]

On or about May 1, Ms. Tousley checked with the West Valley City branch and learned that the second $3,000 check had not been credited to her account (R. 150:74). Later that day, defendant came to Ms. Tousley's home to inquire about the second check (R. 150:74). When she told him it had not cleared, defendant was angry and threatened to hurt

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[3] The two checks are attached at Addendum B.

[4] The information and the prosecutor's notice to the jury make clear that defendant was not charged in connection with his conduct relating to the second check (R. 6-7; R. 150:131).

her (R. 150:75). Afterward, they went together to the West Valley City branch, but it had closed (R. 150:75).

Defendant's and Ms. Tousley's check dealings came to light when Ms. Trina Culley, the lead teller at the West Valley City branch of America First opened the envelope containing the second $3,000 check. She thought it unusual that a cash advance check as large as $3,000 was endorsed by two individuals (R. 150:92-94; State's Ex. 2). Verifying that Patricia Westlake had an account with America First, she compared the "Patricia Westlake" signature on the check with filmed documents of Ms. Westlake's signature and determined that they did not match (R. 150:94-95). Ms. Culley placed a "hold" on the check and mailed it to Ms. Westlake (R. 150:95).

Caroline Twitchell, director of security at America First, called Ms. Tousley to investigate the false check. Ms. Tousley told her that she had lent her ATM card and her PIN to some friends, but had no idea what had happened after that (R. 150:98, 104-05). However, Ms. Tousley did acknowledge having withdrawn $2,500 one day after depositing the first check (R. 150:105-06; Defendant's Ex. 7).

Sometime after April 28, 1998, Patricia Westlake received a telephone call from Ms. Culley (R. 150:110). Ms. Westlake formerly had an account with Providian, which she closed prior to April 28, 1998 (R. 150:108-09). However, the bank continued to send her $3,000 checks as an inducement to reopen her account, even though she "absolutely" did not want the account (R. 150:109). During her conversation with Ms. Culley, Ms. Westlake

learned that Providian had continued to send the $3,000 checks to her 149 South 700 East address (R. 150:110).

Ms. Westlake lived at 149 South 700 East for seven years prior to her moving out in August, 1997 (R. 150:107). The residence at that address had been divided into two separate apartments, one upstairs and the other downstairs (R. 150:107-08). She lived in the downstairs apartment. The resident above her did not have a key to her apartment (R. 150:108). Only she had access to the mail, which was delivered through a mail slot in the front door onto the floor of her hallway (R. 150:108).

Examining the first check for $3,000, State's Exhibit 1, made out on seven months after she had left her old address, Ms. Westlake testified that the "Patricia Westlake" signature on the back of the check was not hers (R. 150:110-11). Ms. Westlake also confirmed that the signature on the back of the second $3,000 check, State's Exhibit 2, was not hers (R. 150:111). She further testified that she did not know defendant, did not owe him $6,000, and never gave him permission to sign her name to the two checks (R. 150:111-12).

SUMMARY OF ARGUMENT

POINT I

Defendant invited any error in the elements instructions by affirmatively approving them on three occasions, and therefore, this Court should not consider his claim of error under the manifest injustice exception to the waiver rule. In any case, defendant has failed to show obvious error in the instructions because, taken as a whole, they fully and adequately

informed the jury of the elements required to convict defendant beyond a reasonable doubt of the charged offenses. Even if there was error in the charge to the jury, defendant was not prejudiced because counsel for both the State and defendant informed the jury that defendant's party liability was essential to the case and evidence of defendant's guilt was uncontroverted.

POINT II

The evidence was sufficient to convict defendant of forgery and theft by deception. Particularly, the evidence showed that defendant, through his residency and the manner in which the mail of the checks' payee was delivered, had exclusive access to forged checks and directed an accomplice to utter the checks and return the proceeds to him. Any inconsistencies in the testimony of the State's principal witness were either trivial or understandable attempts to minimize her culpability, a circumstance which the jury obviously considered in weighing the credibility of her testimony.

ARGUMENT

POINT I

THE COURT SHOULD DECLINE TO CONSIDER DEFENDANT'S CLAIM UNDER THE MANIFEST INJUSTICE EXCEPTION BECAUSE HE INVITED THE CLAIMED ERROR; IN ANY EVENT, BECAUSE THE INSTRUCTIONS AS A WHOLE WERE ADEQUATE TO INFORM THE JURY THAT THE STATE MUST PROVE ALL THE ESSENTIAL ALLEGATIONS OF THE CHARGED OFFENSES BEYOND A REASONABLE DOUBT, DEFENDANT FAILS TO SHOW PLAIN ERROR IN THE JURY CHARGE ON PARTY LIABILITY

Defendant claims the trial court failed to instruct the jury that to convict him of forgery and theft by deception it must find beyond a reasonable doubt that he acted as Ms. Tousley's accomplice, an essential element of both offenses. Aplt. Br. at 14-19. By omitting aiding and abetting from the elements instructions, defendant argues, his fundamental rights to a trial were violated, an error entitled to review under the manifest injustice standard. Aplt. Br. at 19-22. Finally, defendant contends that giving an erroneous elements instruction is not amenable to harmless error review, and even if it is defendant's conviction as an accomplice cannot be upheld on Ms. Tousley's unreliable and incredible testimony. Aplt. Br. at 23-28.

Defendant's argument fails at every juncture. First, defendant is not entitled to review under the manifest injustice standard because trial counsel invited the purported error. Second, the elements instructions, read as a whole, fully and understandably directed the jury to consider the all elements necessary to find defendant guilty of the offenses as an accomplice. Finally, both this Court and the Utah Supreme Court have applied harmless

error analysis to claimed errors in an elements instruction, which if applied in this case fully supports the outcome.

A. Factual background.

At the close of evidence the trial court read the instructions to jury (R. 86-121; 150:123). Those instructions directed the jury "to consider the instructions as a whole" (Instruction #15 at R. 99). They also included an instruction on party ("accomplice") liability couched in the statutory terms and an elements instruction for each charged offenses which required that the jury find defendant guilty only if it found beyond a reasonable doubt the required elements for each offense "as charged in counts [I and II]" (Instruction #19, 21, 25 at R. 103, 103, 110). Further, the information instruction set out the statutory elements of forgery (Count I) and theft by deception (Count II), each charging defendant as "a party to the offense" (Instruction #1 at R. 86).[5]

After reading the instructions to the jury, the trial court asked both the prosecutor and defense counsel if they waived any objections to the jury instructions (R. 150:123). The record at that point only reflects the prosecutor's negative response, but the trial court's acknowledgment of the prosecutor's response and the flow of proceedings, without any apparent objection by defense counsel, plainly suggests that defense counsel silently signaled his waiver of any objection to the instructions (R. 150:123). However, at the end of closing argument, the trial court noted that the parties had an earlier, off-the-record discussion

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[5] All relevant instructions are attached at Addendum C.

concerning the instruction and stated its understanding that both parties had stipulated to the instructions without objection (R. 150:157-58). When the trial court asked for a confirmation of its understanding and offered the parties an opportunity to object, defense counsel responded, "There is no objection" (R. 150:158).

B. Defendant is not entitled to review of his claim under the manifest injustice standard because not only does he fail to satisfy the requirements of the manifest injustice standard, but he also invited the error asserted on appeal.

Although his trial counsel did not object at trial, defendant now argues that because the trial court failed to instruct the jury on accomplice liability as a necessary ***element*** to finding him guilty of the charged offenses, his convictions were manifestly unjust and must therefore be reversed. Aplt. Br. at 20-21. The claim lacks legal merit.

Because defendant failed to object to the instructions in the trial court (R. 123, 157-58), he has waived his claim unless he show that he is entitled to review to avoid manifest injustice. *See State v. Stringham*, 957 P.2d 602, 608 (Utah App. 1998) ("'[J]ury instructions to which a party failed to object at trial will not be reviewed absent a showing of manifest injustice.'") (quoting *State v. Gibson*, 908 P.2d 352, 354 (Utah App. 1995)). *See* Utah R. of Crim. Proc. 19(c).[6]

Defendant correctly asserts that Utah's appellate courts have generally held that "[t]he

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[6] Rule 19(c), Utah Rules of Criminal Procedure, provides: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury is instructed, stating distinctly the matter to which he objects and the ground of his objection. Notwithstanding a party's failure to object, error may be assigned to instructions in order to avoid a manifest injustice."

complete absence of an elements instruction on a crime is an error we review to avoid manifest injustice." *State v. Jones*, 823 P.2d 1059, 1061(Utah 1991) (emhasis added).[7] It is evident from the facts recited above and more particularly argued below, *see* Aple. Br. at Point II, that defendant has failed to show that the accomplice liability element was completely omitted from the trial court's instructions. Therefore, the general rule does not apply in this case.

More importantly, defendant invited the error complained of on appeal and is, therefore, not entitled to review of the claim under the manifest injustice exception. "'[A] party cannot take advantage of an error committed at trial when that party led the trial court into committing the error.'" *State v. Chaney*, 1999 Utah Ct. App. 309, ¶54, 989 P.2d 1091 (*quoting State v. Anderson*, 929 P.2d 1107, 1109 (Utah 1996)). "'[T]he manifest injustice exception has no application in cases in which the defendant invited the very error complained of on appeal.'" *Id.* (quoting *State v. Kiriluk*, 975 P.2d 469, 475 (Utah App.1999)).

In *Perdue*, this Court first found that a defendant waived a challenge to jury

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[7] Defendant also cites four additional cases for the general proposition that complete absence in an instruction of a necessary element of an offense is reviewable under the manifest injustice standard. Aplt. Br. at 21 (citing *State v. Lesley*, 672 P.2d 79, 81 (Utah 1983) ("instruction misstates the law of criminal trespass and is entirely inconsistent with the statutory definition of that offense); *State v. Laine*, 618 P.2d 33, 35 (Utah 1980) (omission of required intent to permanently deprive in theft by deception charge); *American Fork v. Carr*, 970 717, 720 (Utah App. 1998) (omission of required intent for lewdness); *State v. Gibson*, 908 P.2d 352, (Utah App. 1995) (complete omission of lack of consent element in forcible sexual abuse conviction)).

instructions which he himself submitted to the trial court. *Perdue*, 813 P.2d at 1204-06. This Court then declined to review the claim under the manifest injustice standard. The Court first acknowledged that the supreme court had reviewed an instructional error under the manifest injustice in *Lesley*, where the challenged instruction was "'entirely inconsistent with the statutory definition of [the] offense.'" *Id.* at 1206. However, this Court refused to conduct a similar review where the defendant had invited any error by tendering the challenged instruction himself. *Id.* The Court stated:

> Here, we do not reach an evaluation of the correctness of the submitted instruction because if there was error, it was invited by defendant, and ***where invited error butts up against manifest injustice, the invited error rule prevails***.

Id. [Emphasis added.]

In declining to review the instructional challenge, the *Perdue* court particularly relied on the Utah Supreme Court's decision in *State v. Medina*, 738 P.2d 1021 (Utah 1987). In that case, the defendant, when asked by the trial court if either party objected to a subsequently challenged instruction, responded, "I have no objection. I have read it." *Id.* 738 P.2d at 1022. Invoking the invited error rule in spirit, if not in name, the supreme court refused to apply the manifest error exception where "counsel consciously chose not to assert any objection that might have been raised and affirmatively led the trial court to believe that there was nothing wrong with the instruction." *Id.* at 1023.

This circumstances here present even a stronger case for declining review of defendant's claim under the manifest injustice standard than in *Medina*. The trial court first

read the jury instructions aloud in defendant's presence, thus assuring that counsel heard them even if he had not earlier considered them (R. 150:123). Thereafter, the court asked for any objections, and although the record does not at that point reflect an express response from defense counsel, it is apparent from the flow of events that he signaled his assent (R. 150:123). However, before the jury retired and at the end of closing arguments, the trial court noted that the parties had had an off-the-record discussion concerning the instruction and stated its understanding that both parties had stipulated to the instructions without objection (R. 150:157-58). When the trial court asked if the parties agreed with its understanding and offered them an opportunity to make a record of any objections, defense counsel responded, "There is no objection" (R. 150:158). The proceedings clearly show that at multiple points defendant assented to the instructions. Because defendant "affirmatively led the trial court to believe that there was nothing wrong with the instruction," *See Medina*, 738 P.2d at 1023, reassuring the court of his assent on at least three occasions, this court should decline to consider defendant's claim under the manifest injustice exception.

C. The challenged instructions are not obviously incorrect.

In *State v. Lucero*, 866 P.2d 1 (Utah App. 1993), this Court outlined the standard of review applied to a challenged jury instruction:

> A challenge to a jury instruction as incorrectly stating the law presents a question of law, which we review for correctness. *State v. Archuleta*, 850 P.2d 1232, 1244 (Utah), *cert. denied*, 510 U.S. 979 (1993). Jury instructions must be read and evaluated as a whole. *State v. Johnson*, 774 P.2d 1141, 1146 (Utah 1989). They must accurately and adequately inform a criminal jury as to the basic elements of the crime charged. *State v. Roberts*, 711 P.2d 235, 239

> (Utah 1985). However, if taken as a whole they fairly instruct the jury on the law applicable to the case, the fact that one of the instructions, standing alone, is not as accurate as it might have been is not reversible error. *State v. Brooks*, 638 P.2d 537, 542 (Utah 1981); *State v. Tennyson*, 850 P.2d 461, 470 (Utah App. 1993).

Id. at 3; *see also State v. Larsen*, 876 P.2d 391, 396 (Utah App. 1994); *Cage v. Louisiana*, 111 S. Ct. 328, 329 (1990) ("In construing the instruction, we consider how reasonable jurors could have understood the charge as a whole.").

"[J]ury instructions to which a party failed to object at trial will not be reviewed absent a showing of manifest injustice." *State v. Stringham*, 957 P.2d 602, 608 (Utah App. 1998) (quoting *State v. Gibson*, 908 P.2d 352, 354 (Utah App. 1995); Utah R. of Crim. Proc. 19(c). "[I]n most circumstances, the term 'manifest injustice' is synonymous with the 'plain error' standard[.]" *State v. Verde*, 770 P.2d 116, 121-122 (Utah 1989). In order to show plain error, defendant must show: "(i) an error exists; (ii) the error should have been obvious to the trial court; (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant[.]" *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993).

Defendant has failed to satisfy any part of the plain error test. In fact, the instructions plainly inform the jury of the elements necessary to convict defendant of the charged offenses as an accomplice. The jury was instructed "to consider all the instructions as a whole and to regard each in the light of all the others" (Instruction #15 at R. 99). The first paragraph of Instruction 21, instructing the jury on the elements it must find to convict defendant of

forgery states:

> Before you can convict the defendant, BRIAN WILLIAM DRAKE, of the offense of Forgery ***as charged in count I of the information***, you must find from all of the evidence and beyond a reasonable doubt each and every one of the following elements of that offense . . . . [Emphasis added.]

(Instruction #21 at R. 105). Instruction #25, providing for theft by deception, recites the same requirements for that offense (Instruction #25 at R. 110).

The information instruction, reciting the charge for each offense, states:

> You are instructed that the defendant BRIAN WILLIAM DRAKE is charged by the Information which has been duly filed with the commission of FORGERY AND THEFT BY DECEPTION. In Information alleges:
>
> FORGERY, a Third Degree Felony . . . , in that the defendant, BRIAN WILLIAM DRAKE, ***a party to the offense***, did alter, make, complete, execute, authenticate, issue, transfer, publish, or utter any writing so that the writing or the making, completion, execution, authentication, issuance, transference, publication or utterance purported to be the act of another, with a purpose to defraud. [Emphasis added.]

(Instruction #1 at R. 86). Instruction #1 uses the same language, "a party to the offense," to describe theft by deception.

The trial court also gave the jury a party ("accomplice") liability instruction in the language of the operative statute, Utah Code Ann. § 76-2-202 (1999), verbatim:

> Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable ***as a party*** for such conduct. [Emphasis added.]

(Instruction #19 at R. 103).

Crucially, defendant fails to mention that the trial court also gave the following instruction:

> You are instructed that to the Information the defendant has entered a plea of not guilty. ***The plea of not guilty denies each of the essential allegations of the charges contained in the Information and casts upon the State the burden of proving each to your satisfaction and beyond a reasonable doubt.*** [Emphasis added.]

(Instruction #3 at R. 87). The instructions as a whole, by express statement and incorporation by reference to the information, clearly inform the jury of the various elements of defendant's offenses as charged which it must find beyond a reasonable doubt to find him guilty.

This case is distinguishable from *Laine*, cited by defendant in support of his claim. Aplt. Br. at 15, 21. In *Laine*, the Utah Supreme Court found the charge to the jury on the elements of the offense inadequate because, although an information instruction referenced the required element of intent, the instructions as a whole did not require the jury to find that element beyond a reasonable doubt. *Id.* 618 P.2d at 35. Instruction #3 expressly remedies that distinguishing factor in this case.

Defendant acknowledges that not all elements need appear in a single jury instruction. *See* Aplt. Br. at 15. However, he argues that the foregoing instructions, even read together, fail to communicate all the elements at issue in the case. *See* Aplt. Br. at 15. First, defendant claims that neither Instruction 19, nor all the relevant instructions taken together, inform the jury that defendant must have acted as ***Ms. Tousley's*** accomplice. *See* Aplt. Br. at 14-17. Because defendant has failed to cite any authority that the ***identity*** of an accomplice is an

element that must be charged in the information or charged to the jury as an element of an offense, this Court should decline to consider it. *State v. Shepherd*, 1999 Utah Ct. App. 503, ¶27, 989 P.2d 503 ("This court has routinely declined to consider arguments which are not adequately briefed on appeal.") (citation omitted).[8]

Defendant further argues that "[n]o reasonable person, untrained in the law, is capable of performing such legal gymnastics [as assembling the various instructions in this case into a coherent charge to the jury]." Aplt. Br. at 18. Contrary to defendant's claim, Utah's appellate courts have repeatedly found dispersed instructions adequately informed the jury of the elements of the offense charged. *See e.g., State v. Larsen*, 876 P.2d 391, 396 (Utah App. 1994) (finding that because "purpose to deprive" and "intent" were equated in four

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[8] Moreover, while Ms. Tousley's name does not appear in the instructions, the jury could not possibly have been uninformed that she was defendant's accomplice. The instructions repeatedly require the jury to be guided by the evidence in determining the facts of defendant's guilt or innocence. *See* Instruction #7 at R. 91("You are the sole and final judges of all question of fact submitted to you, and you must determine such questions for yourselves from the evidence . . . ."); Instruction #8 at R. 92 ("You are not to consider evidence offered but not admitted, ...); Instruction #9 at R. 93 ("[Y]ou are the final judges and must determine from the evidence what the facts are."); Instruction #10 at R. 94 ("The evidence to be considered by you includes the testimony of witnesses, exhibits received by the Court, stipulations of the parties, reasonable inferences to be drawn from facts proven in the case . . . ."); Instruction #11 at R. 95 ("Two classes of evidence are recognized and admitted in courts of justice . . . ."); Instruction #16 at R. 100 ("Before a defendant may be found guilty of a crime, the evidence must prove beyond a reasonable doubt . . . ."); Instruction #21 & 25 at R. 105, 110 ("Before you can convict the defendant, . . . , you must find from all the evidence and beyond a reasonable doubt . . . . If after careful consideration of all the evidence in this case . . . ."). The evidence points only to Ms. Tousley as a potential accomplice. Thus, this aspect of defendant's claim lacks merit.

other instructions, including one which directed the jury with the phrase, "as defined in these instructions," the instructions as a whole fairly instructed the jury on the law applicable to the case).

Defendant also appears to argue that the trial court failed to adequately define for the jury the operative terms of Instruction #19, the party liability instruction. Aplt. Br. at 19. In support, defendant cites *State v. Harmon*, 712 P.2d 291 (Utah 1986) (per curiam), wherein the supreme court reversed a conviction for attempted robbery because the instructions failed to define "attempt" using the language of the attempt statute. *Id.* at 291-92. *See* Utah Code Ann. § 76-4-101(1), -(2) (1999) ("[A] person is guilty of attempt to commit a crime. . . if . . . he engages in conduct constituting a substantial step toward commission of the offense [which does not occur] unless it is strongly corroborative of the actor's intent to commit the offense."). *Harmon* does not apply to this case.

"Where the term is of common knowledge and usage it is both unnecessary and inadvisable to make the instructions more prolix and complicated by the use of synonyms which add little or nothing to make a term easier to understand than the term itself." *State v. Wilcox*, 498 P.2d 357, 358 (Utah 1972). *See also State v. Rudolph*, 970 P.2d 1221, 1227 (Utah 1998) (refusing to find "obvious" error where the undefined term in instruction, "forcible sexual act," ordinarily connoted required "lack of consent"); *State v. Eagle Book, Inc.*, 583 P.2d 73, 75 (Utah 1978) (trial court reasonably recognized that in distribution of pornographic material prosecution it was unnecessary to define the word, "exhibit" for the

jury because the "word [was] well understood with explicit common meaning"); *State v. Day*, 572 P.2d 703, 705 (Utah 1977) ("Ordinarily, non-technical words of ordinary meaning should not be elaborated upon in the instructions given by the court [since] [i]t is presumed that jurors have ordinary intelligence and understand the meaning of ordinary words like 'depraved' and 'indifference.'").

Unlike the term "attempt," at issue in *Harmon*, the operative terms of section 76-2-202, "solicits, requests, commands, encourages, or intentionally aids," are terms of common understanding, which are not statutorily defined. "Attempt," on the other hand, as the *Harmon* court recognized, while a common term, has a specialized meaning within the criminal code. Defendant cites no authority in support of his claim that the operative terms of the party liability statute should be further defined for instructional purposes. Indeed, other courts have rejected challenges like defendant's in considering the adequacy of the same expressions of party liability used in the Utah statute. *See State v. Gonzales*, 817 P.2d 1186, 1194 (N.M. 1991) (in instructing jury on aiding and abetting, trial court was not required to define instructional terms "help," "cause," and "encourage," as those terms were words with common meanings); *State v. Newbold*, 731 S.W.2d 373, 384 (Mo. Ct. App. 1987) (accomplice liability element not erroneously submitted to jury in terms of "aids or encourages," which were words of ordinary usage and easy understanding), *overruled on other grounds*, *State v. Beeler*, 12 S.W.3d 294, 298 (Mo. 2000). *Cf. Thornton v. State*, 570 So. 2d 762, 772 (Ala. Crim. App. 1990) (further definition of "solicit" or "request" or other

words used in explanation of offense of solicitation to commit controlled substance crime since words were not defined in code and could be given their common meaning). In sum, defendant has failed to show that any error in the instructions was obvious or that, singly or as a whole, the instructions failed to inform the jury that it was required to find that defendant committed the elements of the charged offenses as an accomplice beyond a reasonable doubt.[9]

D. Defendant fails to show prejudice.

For the same reasons defendant fails to establish error, let alone obvious error, he fails to establish prejudice. Defendant's claim of prejudice is based on the erroneous assumption that he has demonstrated an instructional error and is therefore entitled to reversal as a matter of law under *Laine* and *Harmon* and their progeny. Aplt. Br. at 15-21. However, for the reasons stated in subpoints (B) and (C) above, defendant fails to demonstrate that the jury instructions as whole in this case were inadequate. He therefore fails to demonstrate that he is entitled to reversal as a matter of law under *Laine* and *Harmon*.

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[9] At Point II of his brief, defendant claims that he was denied effective assistance of counsel because his counsel failed to alert the trial court of the alleged deficiency in the elements instructions. Because no error occurred in the giving of the instructions, defendant's claim of ineffective assistance also fails. *See State v. Maestas*, 1999 UT 32, ¶20, 984 P.2d 376 ("To establish ineffective assistance of counsel, [a defendant] 'must show that his counsel rendered deficient performance which fell below an objective standard of reasonable professional judgment and that counsel's deficient performance prejudiced him.'") (citations and internal quotations omitted); *State v. Simmons*, 2000 Utah App. Ct. 190, ¶7, 5 P.3d 1228 (""The failure of counsel to make motions or objections which would be futile if raised does not constitute ineffective assistance.'") (citations omitted).

In any event, even assuming there were some error in the instructions here, any error was harmless beyond a reasonable doubt. *See Neder v. United States*, 527 U.S. 1, 119 S. Ct.1827, 1837 (1999) (holding that "the omission of an element is an error that is subject to harmless-error analysis"). The test for determining whether the error is harmless "is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* (citing *Chapman v. California*, 386 U.S.18, 24 (1967)). Even an error in the unanimity instruction may be harmless beyond a reasonable doubt where "the jury necessarily found beyond a reasonable doubt" every required element of the crime. *Tillman v. Cook*, 855 P.2d 211, 228 (Utah App. 1993) (Stewart, J. dissenting). *See also State v. Stevenson*, 884 P.2d 1287, 1292 (Utah App. 1994) (failure to instruct on element was harmless where the trial testimony clearly and indisputably established that element).

Defendant argues that this Court is not bound by *Neder* and may choose not to engage in a harmless error analysis as a matter of state law. Aplt. Br. at 23-26. In support, defendant cites *Harmon* and *Jones*. Aplt. Br. at 25-26. However, in both those cases, the supreme court refused to apply a harmless error analysis because an element "was totally omitted." *Harmon*, 712 P.2d at 292; *Jones,* 823 P.2d at 1061. *See Stevenson,* 884 P.2d at 1292 (applying harmless error and distinguishing *Jones* where "the trial court . . . failed to give the entire elements instruction"). That is not the case here.

Defendant also relies on *State v. Thurman*, 846 P.2d 1256, 1265 (Utah 1993), and Utah Const. Art. I, Sec. 10). Aplt. Br. at 25-26. However, should the Court deem it

necessary to reach this question, defendant fails to articulate any reason for departing from the federal harmless-error analysis in this case. *Cf. State v. Watts*, 750 P.2d 1219, 1221 n.8 (Utah 1988) (reasoning that state constitution may be interpreted differently from federal constitution in order to protect Utahn's "from the vagaries of inconsistent interpretations given to the fourth amendment by the federal courts"). Nor has defendant shown that absent *Neder*'s teaching, harmless-error review would be inappropriate as a matter of state law. As set forth above, *Laine* does not require reversal where, as here, the essential elements are given in separate instructions. *Id.* at 35. Moreover, any claim of instructional error with regard to defendant's participation as Ms. Tousley's accomplice is harmless because her conduct as a principal actor in cashing a false check and retaining part of the proceeds with the belief that "something was wrong, was uncontroverted at trial. *See, e.g., Tillman*, 855 P.2d at 228; *Stevenson*, 884 P.2d at 1292. *See also State v. Kohl*, 2000 UT 35 ¶¶ 27-31, 392 Utah Adv. Rep. 3 (error in failing to instruct jury regarding penalty enhancement offense, that they must find all three defendants acted "in concert with two or more persons," to be "without legal consequence," as all three defendants were tried simultaneously before the same jury and found guilty of the underlying offense). Thus, any error in the instructions given in this case is amenable to harmless error analysis.

Alternatively, defendant claims that even if the *Neder* standard applies, in order to find an instructional error harmless under *Neder*, the missing aiding and abetting element must be "supported by uncontroverted evidence . . . , evidence that could not rationally lead to a

contrary finding with respect to the omitted element." Aplt. Br. at 26-27 (quoting *Neder*, 119 S. Ct. at 1838-39). Defendant interprets this standard only to be an assessment of the evidence supporting his convictions. The evidence in this case withstands harmless error analysis under that interpretation, as discussed below. But beyond the weight of the evidence supporting his convictions, the fact that both the prosecutor and defense counsel directed the jury to Ms. Tousley's involvement in the charged offenses and that all the evidence pointed to her assisting defendant in the commission of the offenses, also makes any omission in the elements instructions harmless.

In *State v. Murphy*, 27 Utah 2d 98, 100, 493 P.2d 617, 619 (1972), the defendant, convicted of first degree murder, claimed the trial court had erred in giving an elements instruction on second-degree murder which did not mention intent to kill as a possible alternative. *Id.* at 619. The defendant asserted that as a result of the omission the jury had no reasonable alternative but to convict him of first degree murder. *Id.* The supreme court doubted the possibility of error considering the language of the first degree murder instruction. *Id.* The court held, however, that any error was cured where the prosecutor, immediately after instruction was given, told jury that "the included offense of second-degree murder, you don't have to have premeditation or deliberation. You don't have to have the intent to kill, but you may have the intent to kill." *Id.*[10]

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[10] Other courts have also found that a prosecutor's remarks in closing cured any error in a defective elements instruction. *See People v. Holt*, 937 P.2d 213, 249-50 (Cal. 1997) (failure to define "sexual intercourse" during rape instructions, so as to specify that

As in *Murphy*, the prosecutor's and defense counsel's remarks rendered any error in the instructions harmless. After hearing all the evidence, which plainly implicated Ms. Tousley in defendant's criminal activity, the prosecutor specifically directed the jury's attention to the party liability instruction: "Now the other thing that I wanted to state to you is instruction No. 19. No. 19 is a very, very important instruction. It's probably the most important instruction - - to be [sic] in this particular case" (R. 150:125). The prosecutor then read the party liability instruction to the jury (R. 150:125). The prosecutor then immediately

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vaginal penetration was required, did not impermissibly allow jury to believe that anal penetration was sufficient, given that rape and sodomy were distinct crimes and instruction for rape was immediately followed by definition of sodomy specifying that anal penetration was required, that court explained, in responding to jury question, that penetration of male sex organ into female sex organ constituted act of sexual intercourse, and that instructions were placed in context by parties' closing arguments); *People v. Malone*, 762 P.2d 1249, 1280 (Cal. 1989) (erroneous instruction, which might have confused capital murder jury into thinking it was required to find defendant guilty as prerequisite to viewing accomplice testimony with distrust, was harmless where entirety of instructions and argument of both defense counsel and prosecutor directed jury to whether accomplice's testimony was corroborated would not have misled reasonable jurors); *State v. Auchampach*, 540 N.W.2d 808, 818 (Minn. 1995) (trial court's jury instructions in prosecution for premeditated first-degree murder, when viewed as a whole, were more than adequate to inform jury of state's burden to prove beyond a reasonable doubt that defendant did not act in heat of passion, even though trial court did not use pattern instruction which enumerates absence of heat of passion as element of premeditated first-degree murder; among other circumstances, state explicitly argued during closing argument that defendant did not act in heat of passion, and defense argued that defendant was guilty of only first-degree manslaughter because state failed to prove beyond reasonable doubt defendant's guilt of any greater crime charged); *State v. Spencer*, 216 N.W.2d 131, 136 (Minn. 1974) (giving erroneous instruction in prosecution for aggravated assault that intent was not necessary element of the offense was not prejudicial error where prosecutor conceded that intent was a necessary element in his closing argument).

directed the jury to the instructions on forgery and theft by deception that "the defendant's a party to the offense" (R. 150:125). Later, the prosecutor essentially acknowledged that Ms. Tousley had been a participant in the offenses, while trying to put her involvement in context and identifying defendant as the "mastermind" who had used Ms. Tousley (R. 150:128, 130). Defense counsel also repeatedly directed the jury to Ms. Tousley's involvement, in an attempt to impeach her (R. 150:140, 145, 150-51). Finally, all the evidence supported Ms. Tousley's involvement in the offenses.[11] In sum, the jury could not possibly have been unaware that it was being instructed that to find defendant guilty as a party to Ms. Tousley's conduct.

Lastly, any error was harmless considering the evidence. Defendant argues that evidence of defendant's guilt was "controverted" because Ms. Tousley's testimony was inconsistent, incredible, and unreliable. Aplt. Br. at 27-28. "Controverted" means "oppose[d] or contest[ed] by action or argument." Webster's Third New International Dictionary 497 (1993). Ms. Tousley testified that defendant gave her a $3,000 check

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[11] *See State v. Labrum*, 881 P.2d 900, 905 (Utah App. 1994) (any error in trial court's failure to instruct jury to make separate and specific finding of firearm use to support firearm enhancement was harmless, absent evidence supporting any theory by which five bullets could have been propelled into victims or their car by means other than through use of firearm); *Erickson v. State*, 13 S.W.2d 850, 851-52 (Tex. Crim. App. 2000) (any error in instruction on offense of driving while intoxicated, which inaccurately stated that prohibited intoxicants included those other than alcohol, was harmless where no evidence of the defendant's intoxication other than be alcohol was introduced and prosecutor asked jury to find that the defendant was intoxicated due to wine and other alcohol only).

endorsed with Ms. Westlake's signature, asked her to cash it, and thereafter took $2,500 (R. 150:64-72). This testimony was unopposed and uncontested. As discussed more fully in Point II of this brief, any inconsistencies in Ms. Tousley's testimony go to peripheral issues and are otherwise reflective of her obvious attempts to limit her own culpability, a fact that would have been obvious to the jury and which it must have considered in rendering its verdict. In sum, even if the instructions omitted party liability as a necessary element of the offenses, defendant has failed to show that he was prejudiced by the omission.

POINT II

VIEWED IN THE LIGHT MOST FAVORABLE TO THE JURY VERDICT, THE EVIDENCE ESTABLISHES THAT DEFENDANT INTENTIONALLY AIDED MS. TOUSLEY IN COMMITTING FORGERY AND THEFT BY DECEPTION

Defendant claims that because Ms. Tousley's testimony was unreliable, the evidence is insufficient to sustain his convictions. The claim is unsupported by the record.[12]

In order to succeed on his claim, defendant must marshal the evidence, including circumstantial evidence, supporting the verdict, then demonstrate that the marshaled evidence fails to establish that he, as a party acting with Ms. Tousley, committed forgery and theft by deception. *State v. Scheel*, 823 P.2d 470, 472 (Utah App. 1991). *See also Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 799 (Utah 1991) (holding that 'one challenging the verdict must

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[12] Defendant preserved his claim by moving to dismiss the charges for insufficient evidence at the close of all the evidence, which the court denied (R. 150:119). *See State v. Holgate*, 2000 UT 74, ¶17, 10 P.3d 346 (holding that a claim of insufficient evidence must be preserved at trial).

marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict"). The appellate court "review[s] the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury" and reverses "only when the evidence, so viewed, is sufficiently inconclusive or inherently improbably that reasonable minds must have entertained a reasonable doubt[.]" *Verde*, 770 P.2d at 124. *See also State v. Lemons*, 844 P.2d 378, 381 (Utah App. 1992), *cert. denied*, 857 P.2d 948 (Utah 1993). "The existence of contradictory evidence or of conflicting inferences do not warrant disturbing the jury's verdict." *State v. Howell*, 649 P.2d 91, 97 (Utah 1982). Moreover, it is within the exclusive province of the jury to judge the credibility of the witnesses and the weight of the evidence. *Id.*; *State v. Jonas*, 793 P.2d 902, 905 (Utah App.), *cert. denied*, 804 P.2d 1232 (Utah 1990).

To convict defendant of forgery the State needed to prove that defendant intentionally or knowingly "made, executed, issued or uttered a writing" which falsely purported to be the unauthorized act of Ms. Westlake with a purpose to defraud anyone. *See* Jury Instruction #20 & 21, R. 104, 105; Utah Code Ann. § 76-6-501 (1999). To convict defendant of theft by deception the State needed to prove that defendant intentionally or knowingly obtained or exercised control over property of America First by deception and with the purpose of depriving America First of its property. *See* Jury Instruction #24 & 25, R. 109, 110; Utah Code Ann. § 76-6-405 (1999). To show defendant was guilty as a party to the offenses the State needed to show either that defendant directly committed the offenses or "solicit[ed],

request[ed], command[ed], encourage[d], or intentionally aid[ed] Ms. Tousley's in her commission of the offense. *See* Jury Instruction #19, R. 103; Utah Code Ann. § 76-2-202 (1999).

The evidence and reasonable inferences drawn from it the amply support defendant's convictions for both offenses. The undisputed evidence was that on April 28, 1998, defendant asked Ms. Tousley to run a check, drawn on Providian National Bank through her checking account at America First Credit Union (R. 150:64-67, 69; State's Ex. 1). The check was made out for $3,000 to "Patricia Westlake," at "149 South Seventh East" in Salt Lake City, and it was already endorsed with Ms. Westlake's name when defendant gave it to Ms. Tousley (R. 150:69-71). Defendant told Ms. Tousley that Ms. Westlake owed him money (R. 150:68-70, 107). However, Ms. Westlake did not know defendant, did not owe him any money, had not signed any checks over to defendant, and had not given him permission to sign her name to any checks (R. 150;110-12).

Defendant offered Ms. Tousley $500 in exchange for her running the check through her account and delivering $2,500 to him (R. 150:70). Although she suspected there was something wrong about the transaction, she endorsed the check, deposited it in her America First account, and delivered $2,500 from that account to defendant the following day (R. 150:70-72, 79). On the same day, April 29, defendant gave Ms. Tousley another $3,000, dated April 27, 1998, made out exactly like the first check, and instructed her to do the same thing with it as she had with the first check (R. 150:72-73; State's Ex. 2). Defendant again

said that Ms. Westlake owed him money (R. 150:73-74). Following defendant's instructions, Ms. Tousley endorsed the back of the check with her name and deposited it into yet a third America First branch (R. 73-74). This check was recognized as suspicious by America First agents and was not cashed (R. 150:74-75, 92-95). A detailed statement of transactions to Ms. Tousley's account, confirmed the transactions Ms. Tousley had previously testified to (R. 150:98-102; State's Exhibit #3).

On April 28, 1998, defendant was living at 149 South 700 East in Salt Lake City, Ms. Patricia Westlake's former address (R. 150:69-70, 107). Ms. Westlake had closed her account at Providian prior to April 28, 1998 (150:108-09). However, Providian had continued to send Ms. Westlake $3,000 checks to her 149 South 700 East address even after she had moved out (R. 150:110). Because mail was delivered through a slot, only the apartment resident at the 149 South 700 East address had access to mail delivered to that residence (R. 150:107-08).

The foregoing evidence amply supports the jury's verdict of guilt on both offenses. Particularly, the evidence showed that defendant, through his residency and the manner in which Ms. Westlake's mail was delivered, had exclusive access to forged checks and directed Ms. Tousley to utter the checks and return the proceeds to him. *See State v. Kihlstrom*, 1999 Utah App. Ct. 289,¶13, 988 P.2d 949 (affirming that "a person who merely utters a forged instrument can be inferred to have had knowledge of the forgery") (citing *State v. Williams*, 712 P.2d 220, 223 (Utah 1985)), *cert. denied*, 4 P.3d. 1289 (Utah 2000). Defendant argues,

however, that Ms. Tousley's testimony was so "false," "perjurious," and "incredible," that the jury must have "entertained a reasonable doubt that the defendant committed the crime[s]." Aplt. Br. at 31-37.

"In reviewing an insufficiency of evidence claim . . . we may not weigh evidence or assess witness credibility, but instead 'assume that the jury believed the evidence and inferences that support the verdict.'" *Chaney*, 1999 Utah Ct. App. at ¶30 (quoting *State v. Wood*, 868 P.2d 70, 87 (Utah 1993)). In light of governing authority, defendant's reliance on inconsistencies in Ms. Tousley's testimony is unavailing. *See State v. Marcum*, 750 P.2d 599, 601 (Utah 1988) ("[I]nconsistencies go merely to the weight of the evidence and the credibility of the witnesses.").

Defendant identifies a number of inconsistencies in Ms. Tousley's trial testimony as compared with her initial interview with police and at the preliminary hearing. In brief, those inconsistencies are as follows: (1) an initial denial that both she and defendant worked at a Taco Bell, (2) an initial statement that, instead of proceeding only with defendant to America First, she was accompanied by defendant an another person, (3) initially denying to police that defendant had driven her to the bank, (4) denying at trial, in opposition to her testimony at the preliminary hearing, that she had written "payed [sic] to the order of," (5) assertion at trial that she only printed her name, whereas casual inspection of the first check shows that the same person "appears" to have written "payed [sic] to the order of," and "Cathi Tousley," (6) initially claiming to have withdrawn the entire $3,000 in two separate transactions, when

she withdrew only $2,500, and (7) assertion that she deposited the second check on April 29, when bank records show that the deposit was on May 1. Aplt. Br. at 33-34.

The foregoing inconsistencies are alternatively trivial or reflective of Ms. Tousley's obvious attempts to minimize her culpability, a preeminent fact at trial. Both the prosecutor and defense counsel made clear beyond mistake that Ms. Tousley was an accomplice at some level in defendant's commission of the charged offenses. The jury was entitled to weigh her testimony and determine the facts in light of her evident involvement. Such inconsistencies as defendant relies on are insufficient to justify reversal.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests that defendant's conviction be affirmed.

ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

Because this case presents no complex or novel questions, the State does not request that it be set for oral argument or that a published opinion issue. This request is bolstered by defendant's uniform failure to fulfill the basic requirements of marshaling the evidence and presenting an adequate record for appeal.

RESPECTFULLY SUBMITTED this 1st day of June, 2001.

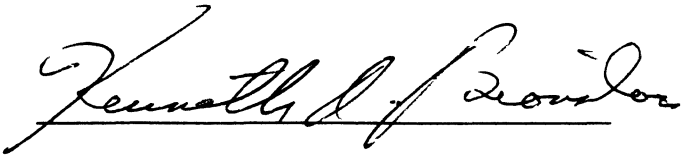
MARK L. SHURTLEFF
Attorney General

Kenneth A. Bronston

KENNETH A. BRONSTON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Stephanie Ames, Gustin, Christian, Skordas, & Caston, L.L.C., attorneys for defendant, Boston Building, Suite 810, 9 Exchange Place, Salt Lake City, Utah 84111, this 1st day of June, 2001.



ADDENDA

APPENDICES

76-2-202. Criminal responsibility for direct commission of offense or for conduct of another.

Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

76-6-405. Theft by deception.

(1) A person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive him thereof.

(2) Theft by deception does not occur, however, when there is only falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed. "Puffing" means an exaggerated commendation of wares or worth in communications addressed to the public or to a class or group.

76-6-501. Forgery — "Writing" defined.

(1) A person is guilty of forgery if, with purpose to defraud anyone, or with knowledge that he is facilitating a fraud to be perpetrated by anyone, he:

(a) alters any writing of another without his authority or utters any such altered writing; or

(b) makes, completes, executes, authenticates, issues, transfers, publishes, or utters any writing so that the writing or the making, completion, execution, authentication, issuance, transference, publication or utterance purports to be the act of another, whether the person is existent or nonexistent, or purports to have been executed at a time or place or in a numbered sequence other than was in fact the case, or to be a copy of an original when no such original existed.

(2) As used in this section, "writing" includes printing, electronic storage or transmission, or any other method of recording valuable information including forms such as:

(a) checks, tokens, stamps, seals, credit cards, badges, trademarks, money, and any other symbols of value, right, privilege, or identification;

(b) a security, revenue stamp, or any other instrument or writing issued by a government or any agency; or

(c) a check, an issue of stocks, bonds, or any other instrument or writing representing an interest in or claim against property, or a pecuniary interest in or claim against any person or enterprise.

(3) Forgery is a felony of the third degree.

Rule 19. Instructions.

(a) At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written request that the court instruct the jury on the law as set forth in the request. At the same time copies of such requests shall be furnished to the other parties. The court shall inform counsel of its proposed action upon the request; and it shall furnish counsel with a copy of its proposed instructions, unless the parties stipulate that such instructions may be given orally, or otherwise waive this requirement.

(b) Upon each written request so presented and given, or refused, the court shall endorse its decision and shall initial or sign it. If part be given and part refused, the court shall distinguish, showing by the endorsement what part of the charge was given and what part was refused

(c) No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury is instructed, stating distinctly the matter to which he objects and the ground of his objection. Notwithstanding a party's failure to object, error may be assigned to instructions in order to avoid a manifest injustice.

(d) The court shall not comment on the evidence in the case, and if the court refers to any of the evidence, it shall instruct the jury that they are the exclusive judges of all questions of fact.

(e) Arguments of the respective parties shall be made after the court has instructed the jury. Unless otherwise provided by law, any limitation upon time for argument shall be within the discretion of the court

ADDENDUM B

Providian National Bank
95 Main Street
Tilton, New Hampshire 03276

54-197/114

March 27 1998

PAY **Three Thousand Dollars and No Cents** $3,000.00

Void after 45 days
Not valid for more than $5,000
Must be endorsed by payee

PAY TO THE ORDER OF Patricia R Westlake
1498 700 E
Salt Lake City UT 84102-1111

030 188457 02 4933 4815

[redacted]

Eileen Stack

⑈05000⑈ ⑆011401973⑆ 12320741 12538⑈6129 ⑈0000300000⑈

240-0881-3

AR 1998

FRB BOSTON
AR 9 30 0110-000 05-01-9
[redacted] RD NH

SAP 06

3243
77516

AMERICA FIRST CREDIT UNION
[redacted] UTAH
801 627 3500

0003 07[redacted]

[redacted]

When used, this check will be charged as a cash advance to my credit account, subject to my available credit.

[redacted]

Must be endorsed by payee.

20 For Deposit Only 42
A.F.C.U.

54-197/114

Providian National Bank
295 Main Street
Tilton, New Hampshire 03276

April 27, 1998

PAY Thr[illegible]e Thousand Dollars and No Cents **$3,000.00**

VOID

Void after 45 days
Not valid for more than $5,000
Must be endorsed by payee

PAY TO THE ORDER OF Patricia R Westlake
149 S 700 E
Salt Lake City UT 84102-1111

Eileen Stack

⑈05000⑈ ⑆011401973⑆ 123207 41 12538 ⑈6157

STAMPED IN ERROR

When used this check will be charged as a cash advance to my credit account, subject to my available credit

Payed in Error

Cathi Goulsby

Patricia R Westlake

- Must be endorsed by payee

Cathi Goulsby

ADDENDUM C

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff,	:	**INSTRUCTIONS TO THE JURY**
vs.	:	**CRIMINAL NO. 991902669**
BRIAN WILLIAM DRAKE,	:	
Defendant .	:	

INSTRUCTION NO. 1

You are instructed that the defendant BRIAN WILLIAM DRAKE is charged by the Information which has been duly filed with the commission of FORGERY and THEFT BY DECEPTION. The Information alleges:

FORGERY, a Third Degree Felony, at 3190 South Richmond Street, in Salt Lake County, State of Utah, on or about April 28, 1998, in violation of Title 76, Chapter 6, Section 501, Utah Code Annotated 1953, as amended, in that the defendant, BRIAN WILLIAM DRAKE, a party to the offense, did alter, make, complete, execute, authenticate, issue, transfer, publish, or utter any writing so that the writing or the making, completion, execution, authentication, issuance, transference, publication or utterance purported to be the act of another, with a purpose to defraud.

THEFT BY DECEPTION, a Third Degree Felony, at 3190 South Richmond Street, in Salt Lake County, State of Utah, on or about April 28, 1998, in violation of Title 76, Chapter 6, Section 405, Utah Code Annotated 1953, as amended, in that the defendant, BRIAN WILLIAM DRAKE, a party to the offense, obtained or exercised control over the property of America First Credit Union by deception, with the purpose to deprive the owner thereof, and that the value of said property is or exceeds $1,000, but is less than $5,000.

INSTRUCTION NO. 2

Instruction No. 1 is not to be considered by you as a statement of the facts proved in this case, but is to be regarded by you merely as a summarized statement of the allegations of the Information. The mere fact that the defendant stands charged with an offense is not to be taken by you as any evidence of his guilt.

INSTRUCTION NO. 3

You are instructed that to the Information the defendant has entered a plea of not guilty. The plea of not guilty denies each of the essential allegations of the charges contained in the Information and casts upon the State the burden of proving each to your satisfaction and beyond a reasonable doubt.

INSTRUCTION NO. 4

You are instructed that the mere fact that the defendant has been charged with an offense and has been held to answer to the charges by a committing magistrate is not any evidence of his guilt and is not even a circumstance which should be considered by you in determining his guilt or innocence.

INSTRUCTION NO. _____

If in these instructions any rule, direction or idea has been stated in varying ways, no emphasis thereon is intended, and none must be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others. You are to consider all the instructions as a whole and to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

INSTRUCTION NO. 13

Every person, acting with the mental state required for the commission of the offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

INSTRUCTION NO. ____

Before you can convict the defendant, BRIAN WILLIAM DRAKE, of the offense of Forgery as charged in count I of the information, you must find from all of the evidence and beyond a reasonable doubt each and every one of the following elements of that offense:

1. That on or about the 28th day of April, 1998, in Salt Lake County, State of Utah, the defendant, BRIAN WILLIAM DRAKE, intentionally or knowingly made, executed, issued or uttered a writing; and

2. That said writing or utterance purported to be the act of Patricia R. Westlake; and

3. That said writing or utterance was not the act of Patricia R. Westlake; and

4. That said writing or utterance was not authorized by Patricia R. Westlake; and

5. That the said defendant then and there knew the writing was not the act of Patricia R. Westlake and was not authorized by Patricia R. Westlake; and

6. That the said defendant then and there had a purpose to defraud.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Forgery as charged in count I of the information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the

foregoing elements, then you must find the defendant not guilty of count I.

INSTRUCTION NO. _____

Before you can convict the defendant, BRIAN WILLIAM DRAKE, of the offense of Theft by Deception as charged in count II of the information, you must find from all of the evidence and beyond a reasonable doubt each and every one of the following elements of that offense:

1. That on or about the 28th day of April, 1998, in Salt Lake County, State of Utah, the defendant, BRIAN WILLIAM DRAKE, intentionally or knowingly obtained or exercised control over the property of America First Credit Union; and

2. That the defendant obtained or exercised control over such property by deception; and

3. That the defendant obtained or exercised control over such property with a purpose to deprive the owner thereof; and

4. That the value of the property was or exceeded $1,000.00 but was less than $5,000.00.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Theft by Deception as charged in count II of the information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of count II.